SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942.

No. ————.

LOGAN W. MARSHALL and GRACE M. MARSHALL,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS BELOW.

Opinions below have been described in the petition for writ of certiorari under the caption "Opinions Below," ante, p. 3.

II.

JURISDICTION.

The statement as to jurisdiction has heretofore been set forth in the petition for writ of certiorari under the caption "Jurisdiction," p. 3.

III.

STATEMENT OF THE CASE.

The facts have been stated in the petition for writ of certiorari under the caption "Summary Statement," ante, pp. 1-3.

IV.

SPECIFICATIONS OF ERROR.

1. The United States Circuit Court of Appeals for the Sixth Circuit erred in affirming the action of the United States Board of Tax Appeals in excluding secondary evidence offered by petitioners of the contents of certain schedules which were attached to their original income-tax return for the calendar year 1936 as it was filed with respondent and which he was unable to produce or account for at the hearing before said Board;

2. Said Circuit Court erred in affirming the action of said Board in refusing to permit petitioner, Logan W. Marshall, to testify as to the value of certain property which petitioners owned and upon the loss of which they based their claim in this case;

3. Said Circuit Court erred in affirming the action of said Board in finding that its conclusions of fact were supported by substantial evidence.

4. Said Circuit Court erred in affirming the decision of said Board.

V.

SUMMARY OF ARGUMENT.

A. By its affirmance of the action of the United States Board of Tax Appeals in refusing to permit petitioners to

use secondary evidence of the contents of certain schedules which were attached to their income-tax return for the calendar year 1936 and which respondent was unable to produce or account for at the hearing, the United States Circuit Court of Appeals for the Sixth Circuit rendered a decision upon a federal question in a way probably in conflict with the applicable decisions of this Court.

B. By its affirmance of the action of said Board in refusing to permit petitioner, Logan W. Marshall, to testify as to the value of certain property which petitioners owned and upon the loss of which they based their claim in this case, said Court rendered a decision upon a federal question in a way probably in conflict with the applicable decisions of this Court;

C. Said Court in neglecting or refusing to discharge its duty to decide questions of law presented to it by the refusal of said Board to permit petitioners to use secondary evidence or to allow petitioner, Logan W. Marshall, to testify as to the value of petitioners' property, so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by said Board as to call for an exercise of this Court's power of supervision;

D. The decision of said Circuit Court in holding that petitioners were not engaged in the business of farming during the calendar years 1936 and 1937 is in conflict with the decisions of other circuit courts of appeals and of some federal district courts.

ARGUMENT.

A.

Under the federal rules of evidence secondary evidence is admissible to prove the contents of a writing where the original thereof is lost or unaccounted for.

At the hearing of this cause before the United States Board of Tax Appeals, petitioners moved to require respondent to disclose who was in possession of their original income-tax return for the calendar year 1936, to produce it, and to submit to cross-examination (R. 28). Respondent admitted that he was unable to produce or account for the original return as filed (R. 31). The purpose of petitioner's motion was to lay the foundation for the use of secondary evidence. Upon respondent's objection the Board refused to receive the evidence offered and petitioners excepted (R. 32). In *Cornett* v. *Williams*, 20 Wallace 226, 22 L. Ed. 254 (1873), this Court held that a copy of an official certified copy of the records of a court, which court records had been burned, was admissible. In the case at bar, the evidence offered by petitioners was in the form of a photostatic copy of the original schedules attached to petitioners' return for the calendar year 1936 as filed and it was, therefore, the best evidence which petitioners had it in their power to produce as required by the *Cornett* case, where it was said that "the rule is to be so applied as to promote the ends of justice * * * " The rule in the *Cornett* case has not been disputed. *Wigmore, Evidence*, 3d Ed., § 1275, note 7 (1940); *In re Margolis*, 23 FS 735 (D.C.S.D.N.Y., 1937); see also *Sicard* v. *Davis*, 6 Peters 124, 8 L. Ed. 342 (1832).

B.

Under the federal rules of evidence the owner of property is competent to testify as to its value, and his testimony with respect thereto is admissible.

At the hearing of this cause before the Board, petitioner, Logan W. Marshall, sought to testify as to the value of the property destroyed by the unprecedented freeze, in order to establish the basis upon which petitioners claimed a deduction representing their loss (R. 40); but upon objection by respondent the evidence was excluded and petitioners excepted (R. 41-42).

The law is well settled that the owner of land is deemed to be qualified to speak as to its value; and the owner of personal property may estimate its worth. *Gorman* v. *Park*, 100 Fed. 553 (1900); *Union Pacific Railroad Company* v. *Lucas*, 136 Fed. 374, 69 CCA 218 (1905); *Alaska Juneau Gold Mining Company* v. *Larson*, 279 Fed. 420 (CCA, 9th, 1922); *Barrett* v. *Fournial*, 21 F. (2d) 298 (CCA, 2d, 1927); *Wigmore, Evidence*, 3d Ed., §§ 714, 716 (1940).

C.

Questions of the admission and exclusion of evidence are questions of law which it is the duty of a circuit court of appeals to decide when such questions are properly presented to it for decision.

The exception taken by petitioners to the action of the Board in excluding evidence offered by them at the hearing and the assignment of such action as error in the petition for review to the United States Circuit Court of Appeals for the Sixth Circuit presented to that Court a question of

law for its decision. In affirming the decision of the Board, however, that Court neglected or refused to rule upon the questions of law involved and contented itself with basing its affirmance upon the ground that there was substantial evidence to support that decision (R. 85). By so doing, the Court failed to exercise the exclusive jurisdiction which is vested in it to review decisions of the Board and to determine whether or not its rulings on the evidence offered by petitioners were in accordance with law. Title 26, § 1141 (a) (1), U. S. C., appendix, this brief, p. 16; *Cohens* v. *Virginia*, 6 Wheaton 264, 5 L. Ed. 257 (1821); *Hormel* v. *Helvering*, 312 U. S. 552, 556, 61 S. Ct. 719, 85 L. Ed. 1037 (1941); *Commissioner of Internal Revenue* v. *Independent Life Insurance Company*, 67 F. (2d) 470 (CCA, 6th, 1933). On the assumption that the Board did err in excluding competent evidence, petitioners have in effect been deprived of their day in court; and in any event, the question whether or not the Board erred in that respect is a question of law which it was the duty of the Circuit Court of Appeals to decide.

D.

The decision of said Court that there was substantial evidence to support the findings of fact of said Board that petitioners were not engaged in the business of farming during the calendar years 1936 and 1937 is erroneous as a matter of law and is in direct conflict with the decisions of other circuit courts of appeals and of some federal district courts.

In its order of May 8, 1942 (R. 85), the Circuit Court found that there was substantial evidence to support the decision of the Board and its order, except as modified in

a particular not here material, was affirmed (R. 85). The only evidence of record on this point was that offered by petitioners which, without contradiction, established that petitioners had purchased the Montana farm in 1928 for the purpose of planting a sweet-cherry orchard and of making a profit (R. 38); that they made investigations and conducted correspondence with the Chief of the Division of Horticulture, Department of Agriculture, State of Montana, and Mr. R. W. Hockaday, a man with over seventeen years' experience (R. 38-39, 75-81) in the methods of growing sweet-cherry orchards, with reference to types of trees, probable costs, yields, expenses, prices of products, markets, competition, etc. (R. 75-81); that they purchased their Ohio farm in 1930 and operated it in conjunction with a tenant (R. 49); that they kept careful records of the income and expenditures of each farm (R. 43); and that they did not either farm for vacation purposes since they spent very little time there (R. 15-17). There is absolutely no evidence in the record to show that petitioners were not operating their farms for the purposes for which they were adapted or to prove that they were pursuing a hobby. On the contrary, the record shows that petitioners were striving at all times to follow approved farming methods and to make a profit if they could (R. 16).

This Court has said that "Business is a very comprehensive term and embraces everything about which a person can be employed," and it has defined the term "business" as "That which occupies the time, attention, and labor of men for the purpose of a livelihood or profit." *Flint* v. *Stone Tracy Company*, 220 U. S. 107, 171, 31 S. Ct. 342, 55 L. Ed. 389 (1910). While the phrase "for the purpose of • • • profit" appears in this definition, the courts have repeatedly held that an undertaking can be deemed to be a business even though no profit is made so long as the taxpayer goes

into the venture with the intention and for the purpose of making a profit. *Commissioner of Internal Revenue* v. *Widener*, 33 F. (2d) 833 (CCA, 3rd, 1929); *Plant* v. *Walsh*, 280 Fed. 722 (D. C. Conn., 1922); *Commissioner of Internal Revenue* v. *Field*, 67 F. (2d) 876 (CCA, 2d, 1933). Indeed, these cases sustained deductions where regular losses were the rule and not the exception. It is the intention of the taxpayer in entering into the business that is controlling, and such intention must be determined from the facts of record. *Thacher* v. *Lowe*, 288 Fed. 994 (D.C.S.D.N.Y., 1922); *Commissioner of Internal Revenue* v. *Field*, supra; *Wilson* v. *Eisner*, 282 Fed. 38 (CCA, 2d, 1922). Good indicia of intention lie in the facts that the taxpayer maintains bookkeeping records, *Whitney* v. *Commissioner of Internal Revenue*, 73 F. (2d) 589 (CCA, 3d, 1934; *George* v. *Commissioner*, 22 BTA 189 (1931); that he studies the problems of the business in which the losses are sustained, *Commissioner* v. *Field*, supra; and that he conforms his activities to the circumstances of his undertaking in order to enhance his chances of making a profit.

The courts have consistently held that farming comes within the definition of a business when it is conducted with a view to making a profit, regardless of whether a profit is made or may be made. *Thacher* v. *Lowe*, 288 Fed., 994 (D.C.S.D.N.Y., 1922); *Plant* v. *Walsh*, 280 Fed. 722 (D. C. Conn., 1922); *Whipple* v. *United States*, 25 F. (2d) 520 (D. C. Mass., 1928); *The Union Trust Company* v. *Commissioner*, 54 F. (2d) 199 (CCA, 6th, 1931). The Board has adhered to this principle and respondent has embodied it in his regulations. *Edwin S. George* v. *Commissioner*, 22 BTA 189 (1931); Regulations 94, Art. 23(e)-5, p. 59. (Appendix p. 17-18).

The Circuit Court of Appeals did not pass directly upon the question whether or not petitioners were engaged in

the business of farming during the calendar years 1936 and 1937, but by affirming the decision of the Board which found that petitioners were not so engaged during those years, it has impliedly done so. Manifestly, the result in this case is, therefore, in direct conflict with the decisions of the Circuit Courts of Appeals for the Second and Third Circuits on analogous facts. *Commissioner of Internal Revenue* v. *Field*, 67 F. (2d) 876 (CCA, 2d, 1933); *Commissioner of Internal Revenue* v. *Widner*, 33 F. (2d) 833 (CCA, 3d, 1929). It does not appear that this Court has passed upon the question.

The evidence offered by the petitioners shows that the indicia of intention to farm as a business were present in this case and that instead of there being substantial evidence to support the Board's finding that they were not so engaged, there was no evidence whatever pointing in that direction. Accordingly, whether or not the petitioners were engaged in the business of farming should have been decided in petitioners' favor as a question of law, and the Circuit Court failed to perform its duty and thereby erred in not so deciding . *Wilson* v. *Eisner*, 282 Fed. 38 (CCA 2d, 1922). See also *Deputy* v. *DuPont*, 308 U. S. 488, 499, 60 S. Ct., 363, 84 L. Ed. 416 (1940), concurring opinion by Mr. Justice Frankfurter.

It is, therefore, respectfully submited that the Writ of Certiorari should be granted.

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